IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Cr. Appeal No.144 of 2006

Reserved on 26.4.2007

Date of decision: 21. 5.2007

Chank Bahadur. Appellant

Versus

State of Himachal Pradesh Respondents

Coram
The Hon'ble Mr. Justice V.K.Ahuja, J.

Whether approved for reporting[1]?

For the appellant: **Mr. Bimal Gupta, Advocate.**

For the respondents: **Mr.Vijay Thakur, Dy. Advocate General.**

V.K.Ahuja, J.

This is an appeal filed by the appellant against the judgment of the Court of Sessions Judge, Kullu dated 19.4.2006 vide which the appellant was held guilty and convicted and sentenced under Section 20 of the NDPS Act, hereinafter referred to as the 'Act', for rigorous imprisonment for a period of 5 years and a fine of Rs.50,000/-. In default of payment of fine, the appellant was to suffer further imprisonment for one year.

Briefly stated, the facts of the case are that on 6.4.2005 PW-2 ASI Biri Singh was present at a place near Bhrain Bridge, along with PW-1 Sunder Lal Constable and Deepak Kumar Constable for patrolling. They had gone in a vehicle being driven by HHC Pitamber Lal. At about 8.15 P.M. they saw a person coming from

[1] Whether the reporters of Local Papers may be allowed to see the Judgment?

Manikaran side who on seeing the police party, turned back and the lights of the vehicle were switched on. The said person threw a bag being carried by him in his right hand and fled away, who was intercepted by the police and brought to the spot where bag was thrown. The bag was having something in the shape of Chapatti which had come out of the bag and the said person and on enquiry, stated that the said substance was Charas. No independent witness could be joined at that time. PW-2 Biri Singh joined Sunder Lal and Deepak Kumar Constables as witnesses. On search of the bag Charas was found which on weighment was found to be 750 gms. Two samples of 25 gms. each were taken and the remaining Charas was put in the same bag after putting it in the envelope. The Charas was taken in possession vide recovery memo. which was also signed by both the witnesses. The bag was also containing 50 notes in the denomination of Rs.500/- and one in the denomination of Rs.10/- and two currency notes of Nepal of the denomination of Rs.10/- each were also found. PW-2 ASI Biri Singh took personal search of the accused, arrested the accused and sent the Ruka Ex.PW-2/B to Police Station for registration of the case. He prepared the site plan and on return to Police Station handed over the case property along with the documents and the accused to the SHO PW-6 Badri Singh. FIR was registered and the case property was re-sealed by PW-6 SHO Badri Singh and he deposited the case property with MHC Rup Singh PW-4 and NCB form was also filled in. It is in evidence that the special repot was sent to S.P.Kullu which was received by PW-3 SI Vikas Reader to S.P.Kullu who produced the same before the Dy. S.P. Sealed

sample was sent to the Chemical Examiner through PW-5 Lokender Pal and on receipt of the report of the Chemical Examiner, challan was present before the learned trial Court, who tried the appellant under Section 20 of the Act leading to his conviction and sentence as detailed above.

I have heard Mr. Bimal Gupta, learned counsel for the appellant and Mr.Vijay Thakur, learned Dy. Advocate General for the State/respondent.

The main submissions made by the learned counsel for the appellant were that the conscious and exclusive possession of the appellant was not proved since the bag was recovered from the ground. The next plea raised was that there are contradictions in the statements of the official witnesses and therefore, these statements cannot be relied upon. It was also submitted that the Investigating Officer who made the recoveries could not have been associated with the investigation of the case and Constable Deepak Kumar Constable was a material witness who was given up by the prosecution and his non-examination proves fatal for the prosecution case. Lastly, it was submitted that independent witnesses were not associated and therefore, the statements of official witnesses in the absence of independent corroboration cannot be relied upon.

On the other hand, the learned Dy. Advocate General for the State had submitted that the prosecution had clearly established the exclusive and conscious possession of the accused and there are no material contradictions in the statements of the official witnesses and as such the findings of the learned trial Court holding

the appellant guilty and convicting and sentencing him are liable to be affirmed.

Coming to the first plea raised that the conscious and exclusive possession of the appellant was not proved since the bag was recovered from the road which had been allegedly thrown by the appellant, the statements of the witnesses have to be appreciated before any conclusion is drawn. PW-1 Constable Sunder Lal and also a member of the raiding party, has stated that at 8.15 P.M. they spotted a person coming from Manikaran side who on seeing the police party turned back, threw a bag being carried by him in his right hand and fled away. That person was over-powered by them at a distance of 15 steps. He further stated that the accused present in the Court is the same person. PW-2 ASI Biri Singh and In-charge of the raiding party also stated similarly that the said person on seeing the police turned back and threw a bag being carried by him in his right hand and fled away. The said person was over-powered and was brought back to the place where the bag was thrown and the said person was the accused present in Court.

A perusal of the cross-examination of PW-1 Sunder Lal shows that the only suggestion made to him was that when the accused was intercepted, he was asked whether he has seen 2-3 persons absconding upwards who had thrown a bag on the road on which the accused replied in negative and that that he was coming from his place of work. It was also suggested that the accused was brought to Kullu and the unclaimed bag found on the road was planted on the accused by falsely implicating him. In

cross-examination of ASI Biri Singh it was suggested to him that the accused was not spotted nor Charas was recovered from him. It was also suggested to him as to whether he had seen 2-3 persons running upwards and had thrown a bag on the road and the accused replied in negative and told that he was coming from his place of work. Thereafter, the accused was brought and it was suggested that a false case was planted against the accused.

The cross-examination of these two witnesses does not lead to an inference that the bag was thrown by 2-3 persons or the accused was being enquired into about those 2-3 persons and the case was foisted upon them. There was a no suggestion to the witnesses as to from where the accused was coming, with whom he had been working and when he was free from his work and no witness in defence was examined to substantiate his plea that the accused was coming from his work. The statement of the witness shows that the accused was immediately apprehended at a distance of 15 steps from the place where he threw the bag. There was no suggestion that since it was dark at that time, the identity of the accused was not established and he was falsely implicated on suspicion only. This fact also cannot be lost sight of that the accused was also found in possession of Rs.25,000/- and this money cannot be planted by the police apart from 750 gms of Charas until and unless they have any reasons to falsely implicate the accused for which there were no suggestions made to any of the witnesses. The accused admittedly was a Nepali and currency notes of Nepal were also recovered from the bag and the police officials had no reason to falsely implicate the accused who was a

Nepali and they had no animus against him to falsely implicate him. It has been held by the Hon'ble Apex Court also that until and unless there are some allegations or proof on record to show that the police had any reason to falsely implicate the accused, their statements cannot be disbelieved simply because of their official status.

Apart from the above, from the cross-examination of the witnesses or the statements of PW-1 and PW-2 it cannot be made out that there was any mistake in apprehending the accused or that the accused was falsely apprehended. The mere fact that the accused threw the bag and tried to run away does not lead to the inference that exclusive and conscious possession of the accused was not proved since if it held so, every person who starts running by throwing the incriminating article can take up the plea that he was not found in exclusive and conscious possession of the incriminating article. That plea can only be accepted if the evidence or the cross-examination of the witnesses prove that there was some mistake committed in apprehending the accused or that he was arrested on suspicion only but the evidence led clearly proves that it was the accused who threw the bag and tried to fled away but was over-powered and there is nothing on record to show that the accused was wrongly arrested by the police.

Coming to the next plea with regard to the contradictions, the main contradiction pointed out was that PW-2 ASI Biri Singh has stated that the parcels were got sealed through Constable Sunder Singh and Constable Deepak Kumar from three sides whereas, PW-1 has stated that the parcels were sealed by

Constable Deepak Kumar and the Investigating Officer. This is the only contradiction pointed out. The recoveries were effected on 6.4.2005 while the witnesses were examined in March, 2006, almost one year after occurrence and this type of contradiction is bound to be there in case of natural witnesses and has to be ignored.

The next plea taken was that the same Investigating Officer could not have investigated the case and he should have handed over the investigation to some other person. It is in evidence that the recoveries were effected at about 8.15 P.M. near Bhunter and the distance of this place from the Police Station Kullu has been mentioned in the FIR Ex.PW-6/A as 17 KMs from the Police Station. In such circumstances when the recovery had been effected at a distance of 17 KMs from the Police Station late in the evening, it cannot be expected that the Investigating Officer could have stopped there, made efforts to call another Investigating Officer to the spot who could have investigated the case. It is not the requirement of law that in such circumstances and in these facts, the Investigating Officer who makes the recovery can not carry on with the investigation of the case. The Investigating Officer had no interest to falsely implicate the accused and once he had apprehended the accused suddenly at the spot, it was for him to have continued with the investigation of the case and he could have entrusted the case to some other Investigating Officer in case some other Investigating Officer was present at the spot. This contention put forth by the learned counsel for the appellant is therefore, repelled being devoid of any force.

Reliance was placed upon the decision in ***Bhagwan Singh*** v. ***State of Rajasthan*** (1976)1 SCC 15. The case was of offering bribe and the investigation was done by the complainant Head Constable for offence of offering bribe. The facts of that case are different and do not apply to the present case. Reliance was also placed upon the decision in ***Darshan Kumar*** v. ***State of Rajasthan*** 1994 Cri L.J.NOC.28. It was observed that an officer who had effected certain search, recovered the contraband and also lodged FIR against the accused person is not competent to undertake the investigation. This decision is not in detail and does not give specific reasons and the facts of the case are not mentioned, this decision is therefore, not attracted to the present case. The decision in ***Megha Singh*** v. ***State of Haryana*** (1996)11 SCC 709 was relied upon wherein the investigation was carried on by the very police officer who lodged the complaint. It was held that it was not conducive to fair and impartial investigation. The case was under TADA and the facts of the case were different and are not attracted to the case under Section 20 of the 'Act'.

Coming to the plea regarding non-joinder of independent witnesses. No case law was cited. However, the learned Dy.. Advocate General relied upon the two decisions of this Court. The decision in ***Jauni Ram*** v. ***State of H.P.*** 2005(1) Shim.L.C.54 shows that a plea was taken in a case of under Section 20 of the Act that independent non-official witnesses have not been associated and no efforts have been made to associate non-official witnesses in the recovery. It was held that non-association of official witnesses cannot lead to the conclusion that prosecution case is false. It

cannot be said that such a huge amount of charas weighing about 2600 gms was planted upon the accused to falsely implicate him. Similar observations were also made in ***Ram Lal and another*** vs. ***State of H.P.*** 2005(1)Shim.L.C.158).

Coming to the facts of this case. PW-2 ASI Biri Singh Investigating Officer in the case has clearly stated in examination-in-chief itself that the possibility of joining of independent witnesses was not there and so he joined the two constables as witnesses. In cross-examination he has stated that they had no prior information. The place of occurrence was at a distance of 17 KMs from Police Station Kullu. There was a bridge 50 Mts. ahead. He admitted that Manikaran is a tourist place and the traffic remains in progress but he never admitted that the vehicles were passing at that time on the road. PW-1 Sunder Lal has stated that neither any vehicle passed from the place of occurrence for 15-20 minutes nor any person crossed through that place. He stated that the place of occurrence is at a distance of 5-6 KMs. from Bhuntar. There are residential houses and shops at Chhrotnallah. A bridge was being constructed at a distance of 550 Meters ahead but it cannot be said that the labourers will be working still at this late hour and they could have been associated from a distance of 50 Metres. He denied that the construction of a new bridge known as Balu Ra Ghera is going on.

Nothing could be brought in cross-examination of this witness which could even lead to the inference that there were houses, shops or persons available near the place of recovery. There is nothing to suggest that persons could have been associated at such a late hour from a place where there are no

shops or houses nearby and the Investigating Officer had given the justification for non--joining of independent witnesses which reasoning appears to be plausible in the facts and circumstances of the case and the place where the recovery was effected. The above two decisions of this court also lead credence to my conclusion that it was not possible to associate independent witnesses and non-joining of independent witnesses in such circumstances, does not lead to the inference that the statements of the independent witnesses cannot be relied upon.

On appraisal of evidence on record, it is clear that there are statements of PW-1 Constable Sunder Lal and PW-2 Biri Singh Investigating Officer which have been referred to above and which clearly prove that the bag was thrown by the accused who was over-powered at some distance and there is nothing to suggest that the appellant was apprehended wrongly or that he had not thrown the bag at that place. The recoveries were effected in a proper manner after taking the samples separately and sealing them. The mere fact that the prosecution had not examined Deepak Kumar the other constable who was also present at that time is not sufficient to hold that the his non-examination proves fatal for the prosecution. It is not the number of witnesses that matters but the quality of the testimony and statement of these two material witnesses do not suffer from any infirmity. This statement has been further corroborated by the statement of PW Inspector SHO Badri Singh who recorded the FIR and before whom the case property was produced and he resealed them with his own seal and deposited the same with MHC Rup Singh for keeping the same in

the Malkhana. The sample was properly sent to Chemical Analyst as per the statement of PW-5 Constable Lokender Singh and therefore the report of Chemical Examiner Ex.PX can be linked with the accused which shows that the contents of the sample were found to be of Charas. The special report was also sent to the Superintendent of Police, Kullu as is clear from the statement of PW-2.

From the above detailed discussion of the evidence, it is clear that the findings recorded by the learned trial Court do not suffer from any infirmity and are liable to be affirmed. The evidence has been discussed in detail by the learned trial Court. No other point was urged during the course of arguments. On appraisal of evidence led by the prosecution, I accordingly hold that the findings of trial Court holding the appellant guilty under Section 20 of the NDPS Act are liable to be affirmed and are accordingly affirmed. Now coming to the sentence imposed, the sentence awarded by the learned trial Court was proper which calls for no interference by this Court. In the result, there is no merit in the appeal and the same is dismissed being devoid of any merit.

21st May, 2007 (V.K.Ahuja),J.
(SDS)